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No. 80-1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES TAMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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1. The government has, in effect, confessed error with respect to petitioner Tamer. Although it convinced the court of appeals that the trial court's instructions regarding both a Tamer-centered conspiracy (concealment) and a Goldfarb-centered conspiracy (unlicensed operation) were correct,[1] the government now recognizes that the portion of the charge defining the Tamer-centered conspiracy was in error (Brief in Opp., at p. 6 & n.4).[2] The government has thus responded to the second question presented in our Petition by agreeing with us

[1] See, e.g., the government's Brief in the court of appeals (at pp. 73-75); and the opinion of the court of appeals (Pet. App. No. 80-1979, at pp. 15a, 20a).

[2] *Compare* the government's concession in this Court (Brief in Opp., at p. 6: "the trial court probably erred in suggesting in its instructions on the conspiracy count . . . that all regulations of the Nevada Gaming Commission have the force of penal law"), *with* its post-trial position in the district court "that a violation of the Regulations alone would predicate a Travel Act violation." (Pet. No. 80-1979, at p. 9).

that the trial court misconstrued the Travel Act when it converted a non-penal state regulation into "unlawful activity" within the meaning of the Act (18 U.S.C. §1952(b)).[3]

Since petitioner Tamer was convicted only on the conspiracy count and since there is no longer any dispute that the instructions improperly construed the Travel Act and permitted a guilty verdict for actions that Congress has not made criminal, Tamer's conviction must be reversed. The government, however, seeks to avoid this consequence of the trial court's error by arguing that although the instructions concerning the Tamer-centered conspiracy were improper, the instructions concerning the Goldfarb-centered conspiracy under the same count were correct and that "it seems likely that the jury must have found" this latter conspiracy rather than the Tamer-centered "conspiracy to violate a regulation."[4] The only basis for the government's notion of what "seems likely" is that the jury acquitted petitioner of the substantive count against him.[5]

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[3] See our Petition, at pp. 18-25. The trial court had reached this result on the basis that a federal judge applying the Travel Act must interpret state law from a federal viewpoint and therefore could find "unlawful activity" under state law even if the state legislature had not made the activity criminal (*id.* at 22-23).

As a result of this misinterpretation, the trial court instructed the jury that the illegal activity involved in the Tamer-centered conspiracy consisted of petitioner Tamer's "causing to be concealed or aiding in the concealment of his true role at the casino — in violation of Regulation 3.100.1," which is not a state criminal offense. (Pet. App. No. 80-1979, at p. 58a n.1; Pet. No. 80-1979, at pp. 6-8).

[4] Brief in Opp., at pp. 10, 7 n.4.

[5] *Id.* at p. 7 n.4.

The district court, however, indicated that it was impossible to say with any degree of certainty on what theory the jury's general verdict of guilt rested. In denying petitioner's post-trial motions, the district court ruled on the premise that its instructions on both conspiracies were correct, but cautioned that *"[i]f one theory was correct and one was incorrect, it would be possible that the jury convicted on the basis of a conspiracy to do non-illegal acts."* (Pet. App. No. 80-1979, at p. 82a n.3, emphasis added). The district court thus recognized what the government in this Court has apparently forgotten — namely, that "conspiracy and the completed substantive offense [are] separate crimes," *Ianelli* v. *United States,* 420 U.S. 770, 777 (1975), and that there is nothing inconsistent about a jury's convicting on conspiracy and acquitting on the substantive offense.[6] That is particularly true in this case since the substantive count on which Tamer was acquitted (Count 2) appeared on its face to charge unlicensed operation by Tamer while the erroneous conspiracy instructions concerned concealment.[7] Moreover, even aside from the faulty premise of its argument, the government can do no better than speculate about what "seems" to have been on the minds of the jurors.

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[6] In addition to *Ianelli* v. *United States, supra,* and the cases there cited, see e.g., United States v. Wylie, 625 F.2d 1371, 1381 (5th Cir. 1980), *cert. denied,* ___ U.S. ___ (1981) (101 S.Ct. 863). ("conviction on the substantive count will require the consummation of the crime, which, of course, is not essential for completing the crime of conspiracy"). To illustrate, the acquittal of a person on a charge of murder would not require that the conviction for conspiracy to murder be set aside.

[7] *Compare* Count 2 of the Indictment, at p. 45 of the Appendix in the court of appeals, *with* the court's conspiracy instructions, *id.* at 1205-1208. The court read Count 2 to the jury (*id.* at 1218-1220) and a recording of the instructions was sent to the jury (*id.* at 1234).

In these circumstances, the rule followed in *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957), and numerous other decisions of this Court is controlling: a verdict must be set aside when it "is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Accord, e.g., Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931); *Williams* v. *North Carolina*, 317 U.S. 287, 291-292 (1942); *Cramer* v. *United States*, 325 U.S. 1, 34 n.45 (1945); *Haupt* v. *United States*, 330 U.S. 631, 641 n.1 (1947); *Grunewald* v. *United States*, 353 U.S. 391, 415 (1957); *New York Times* v. *Sullivan*, 376 U.S. 254, 284 (1964); *Street* v. *New York*, 394 U.S. 576, 586 (1969); *Leary* v. *United States*, 395 U.S. 6, 31-32 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564, 569-571 (1970); *Sandstrom* v. *Montana*, 442 U.S. 510, 525-526 (1979).[8]

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[8] Rather than citing this Court's decisions on point, the government (Brief in Opp., at p. 7 n.4) relies on two court of appeals decisions that seem to hold that when an offense may be committed by multiple means, the validity of any one of the means will support the conviction. The circuits, however, are in conflict over this issue, with a majority following a contrary rule and requiring reversal if any one of the alleged means is invalid. See *United States* v. *Kavazanjian*, 623 F.2d 730, 739-740 (1st Cir. 1980); *United States* v. *Tarnopol*, 561 F.2d 466, 475 (3rd Cir. 1977); *United States* v. *Head*, 641 F.2d 174, 178-179 (4th Cir. 1981); *Van Liew* v. *United States*, 321 F.2d 664, 672 (5th Cir. 1963); and *United States* v. *Carman*, 577 F.2d 556, 566-568 (9th Cir. 1978). *Compare United States* v. *Tanner*, 471 F.2d 128, 139-140 (7th Cir.), *cert denied*, 409 U.S. 949 (1972), *with United States* v. *Baranski*, 484 F.2d 556, 559-562 (7th Cir. 1973).

At all events, the decisions of this Court cited in the text are controlling here. In light of the district court's instruction, there is no dispute that two different conspiracies (or offenses) were charged in a single count, rather than one conspiracy that had multiple objects. See our Petition (No. 80-1979), at p. 12 n.11.

In sum, we believe, as does the government, that the district court gave improper instructions based on its misinterpretation of the Travel Act and permitted the jury to convict petitioner Tamer for activities that are not criminal. Since the court's error is plain, *Yates* and the other decisions of this Court cited above require that petitioner's conviction be set aside. In this situation, we therefore believe it is appropriate for the Court to grant the petition and summarily reverse the judgment below.[9]

2. Our Petition also raised the question whether a defendant in a federal criminal trial in which two separate offenses are charged in a single count is entitled, upon timely request, to a specific unanimity charge in order to protect his right to a unanimous verdict under the Sixth Amendment (Pet. No. 80-1979, at pp. 12-18). The government has responded to our arguments in this regard by suggesting that this is not an appropriate case to resolve the disagreement among the circuits on this issue because it appears — or "seems likely" — that the jury convicted on the basis of the Goldfarb-centered conspiracy rather than the Tamer-centered conspiracy (Brief in Opp., at p. 10).

We have already discussed why the government's statement about what the jury had in mind is nothing more than mere speculation. In any event, what seems likely to the government at this stage of the case does not

[9] We have joined in the certiorari petition filed by co-defendant Goldfarb (No. 80-1983) and therefore disagree with the government's contentions regarding the validity of the court's instructions on the Goldfarb-centered conspiracy. Because petitioner Tamer was convicted and sentenced only on the conspiracy count and because his conviction must be set aside in any event, there is no need for the Court to consider that issue with respect to him.

diminish the obvious importance of this issue (which the government does not contest) and does not in any manner alter the defendant's Sixth Amendment right to specific protection at trial in order to ensure that the jury acts unanimously. The government's reply that it must be "assumed" the jury so acted is unresponsive to our arguments regarding why a defendant's constitutional right to a unanimous verdict cannot be trusted to assumptions when the trial judge "has a powerful tool at his disposal to protect the constitutional" right of the defendant — "the jury instruction." *Carter* v. *Kentucky*, ___ U.S. ___ (1981) (101 S.Ct. 1112, 1120). See Pet. No. 80-1979, at pp. 16-18.

Although the government's confession of error on the conspiracy instructions is, we believe, dispositive and requires reversal of petitioner Tamer's conviction, if the Court does not deem it appropriate to dispose of the case on that ground the Sixth Amendment issue would remain and, for the reasons stated in our Petition, would clearly warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. As discussed above, we believe this is an appropriate case for summary reversal of the judgment of the court of appeals affirming petitioner's conviction.

Respectfully submitted,

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